

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of The National
Exchange Carrier Association, Inc.

Petition for Interim Waiver of
Section 36.2(a)(3) of the
Commission's Rules

CC Docket No. 80-286
DA 98-909

REPLY COMMENTS OF AMERICA ONLINE, INC.

America Online, Inc. ("AOL"),^{1/} by its attorneys, hereby submits its reply comments to the Petition of the National Exchange Carrier Association, Inc. ("NECA") for an interim waiver of Section 36.2(a)(3) of the Commission's rules.^{2/}

INTRODUCTION AND SUMMARY

In its Petition, NECA requests that the Commission waive its jurisdictional separations rules to permit local exchange carriers ("LECs") participating in NECA's traffic sensitive access pool to use data from an earlier study period (or an average of data from several earlier study periods) to determine the relative state/interstate use of their facilities.^{3/} NECA claims that

^{1/} Headquartered in Dulles, Virginia, AOL is currently the leading Internet online company, with roughly 11 million members in the United States, Canada, the United Kingdom, France, Germany, Sweden, Switzerland, Austria and Japan. An Australian service is planned for 1998.

^{2/} The FCC's jurisdictional separations rules are intended to apportion costs among categories or jurisdictions by "actual use" or by direct assignment. See 47 C.F.R. § 36.2(a)(1). Section 36.2(a)(3) of the FCC's rules requires carriers to determine actual use measurements in studies of traffic handled during a representative period for all traffic. 47 C.F.R. § 36.2(a)(3).

^{3/} See In the Matter of The National Exchange Carrier Association, Inc. Petition for Waiver of Section 36.2(a)(3) of the Commission's Rules, CC Docket No. 80-286, Petition for Interim Waiver (filed May 8, 1998) ("NECA Petition") at 6.

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requiring LECs to perform traffic studies using current data, as required by Section 36.2(a)(3), creates distortions in the cost allocation process because the current data includes increasing amounts of Internet Service Provider (“ISP”) traffic which NECA believes should be properly classified as interstate for purposes of jurisdictional separations.^{4/}

AOL agrees with those commenters that assert that NECA’s request does not meet the Commission’s standard for grant of a waiver and should be denied.^{5/} The Commission’s rules permit the grant of a waiver only for good cause shown.^{6/} Neither NECA’s Petition nor the comments filed in support of the petition, meet this good cause standard. Currently, the Commission’s rules require all carriers to treat ISP traffic as intrastate. NECA’s argument for a waiver rests completely on its belief and unsupported assertions that the Commission’s rules should be changed and that ISP traffic should now be classified as interstate. As a threshold matter, the Commission has addressed this issue on numerous occasions and, each time, has not elected to classify ISP traffic as interstate. In this proceeding, no party has provided any evidence of special circumstances which warrant a deviation from this general rule.

Indeed, as explained more fully below, despite numerous attempts by incumbent carriers to effect a change in the jurisdictional classification of ISP traffic, the Commission has never treated ISP traffic as interstate and should not begin to do so now. Even assuming, however, that the Commission were to examine anew this issue, for the FCC to reverse its long-standing

^{4/} See id. at 2-3.

^{5/} See Comments of MCI Telecommunications Corporation (“MCI”), CC Docket No. 80-286 (filed June 4, 1998) (“MCI Comments”) at 2; Comments of the Association for Local Telecommunications Services (“ALTS”), CC Docket No. 80-286 (filed June 4, 1998) (“ALTS Comments”) at 18.

^{6/} 47 C.F.R. § 1.3. See, e.g., Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

position in the context of a waiver petition proceeding would be inappropriate, especially in light of the careful consideration that even NECA asserts the issue deserves.

Finally, NECA and its supporters have failed to offer any real data as to how Internet traffic has distorted, or will distort in the future, absent the requested waiver, the separations allocations process. Indeed, the claims of NECA and the supporting incumbent LEC parties are based merely on unsubstantiated data and/or rough estimates of how ISP traffic will impact the jurisdictional separations process. Most importantly, these arguments assume the result that NECA seeks – a holding by the Commission that ISP traffic is interstate. On this basis alone, the NECA Petition falls far short of legal requirements for a good cause waiver and, accordingly, the Commission should deny NECA’s petition and continue to apply its existing rules.^{7/}

DISCUSSION

The Commission has the authority to issue a waiver only upon a showing of “good cause.”^{8/} Thus, the FCC may exercise its discretion to waive its rules only where particular facts would make strict compliance inconsistent with the public interest.^{9/} As a legal and factual matter, NECA and its supporters have not met this standard. Indeed, the asserted basis for the NECA waiver appears to be little more than NECA’s belief that ISP traffic should be classified

^{7/} Significantly, the assertions of NECA and other incumbent LECs regarding the jurisdictional nature of ISP traffic are already before the Commission in several proceedings. See, e.g., Request by ALTS for Clarification of the Commission’s Rule Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30 (filed June 20, 1997) (“ALTS Reciprocal Compensation Request for Clarification”); In the Matter of Access Charge Reform, First Report and Order, FCC No. 97-158, CC Dockets Nos. 96-262, 94-1, 91-213, 95-72 (released May 16, 1997) at ¶ 345 (“Access Charge Reform Order”), appeal pending, Southwestern Bell Telephone Co. v. FCC, No. 97-2661 et seq. (8th Cir.); In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, FCC No. 97-354, CC Docket No. 80-286 (released October 7, 1997) (“Separations Reform NPRM”); In the Matter of Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Inquiry, 11 FCC Rcd 21354, 21490-93 (1996) (“Internet NOI”).

^{8/} 47 C.F.R. § 1.3.

^{9/} See Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

as interstate. While NECA and its supporters may find an interstate classification of Internet traffic preferable to existing law, this preference is not a sound basis for the Commission to reverse course on the classification of ISP traffic, even for an interim period.^{10/}

Significantly, the issue of how ISP traffic should be classified for regulatory purposes has arisen in a number of proceedings, and in all of these proceedings, the Commission has never once ruled that ISP traffic should be treated as interstate. For example, in its recent Access Charge Reform Order, the Commission specifically reaffirmed its conclusion that per-minute interstate interexchange carrier access charges for information service providers (of which Internet Service Providers are a subset) should not be imposed.^{11/} In doing so, the Commission specifically rejected the notion that ISPs use the public switched network in a manner analogous to interexchange carriers, and explicitly stated that ISPs share many similarities with, and are more akin to, local business end users.^{12/} Significantly, the FCC expressly found that there was no evidence that incumbent LECs were bearing uncompensated costs due to ISP traffic,^{13/} an argument here advanced by many commenting incumbent LECs as grounds to justify the grant of the NECA Petition.^{14/}

Similarly, in addition to this consistent position at the FCC, each and every state commission that has been asked to determine the regulatory classification of ISP traffic, in the

^{10/} See, e.g., Application of Oregon Radio Inc. and Storer Broadcasting Company, FCC 56-1133, 14 RR 742 (1956) (If a party believes a rule is either ineffective or inappropriate, “a request for an individual waiver is not the proper remedy. Rather, a petition for rule making to change the basis of the rule would be required.”).

^{11/} In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, 12 FCC Rcd 15982 (1997) (“Access Charge Reform Order”) at ¶¶ 344-45.

^{12/} Id. at ¶ 345.

^{13/} Id. at ¶ 346.

^{14/} See, e.g., Comments of Northeast Florida Telephone Company at 3; Comments of the Washington Independent Telephone Association at 2; Comments of Home Telephone Company at 5-6.

context of proceedings concerning the obligation to pay reciprocal compensation, has also determined that ISP traffic should be treated as intrastate traffic.^{15/} These state commissions generally agree that nothing in any state law, the Communications Act of 1934, the Telecommunications Act of 1996, or any interconnection agreement provides any support for the argument that ISP traffic should be classified as interstate for regulatory purposes.^{16/} In light of these consistent findings, it would be entirely inappropriate for the Commission now to declare that ISP traffic should be treated differently for purposes of traffic studies because of the “possibility” that it may someday be deemed to be interstate.

Indeed, even altering the current regulatory treatment of ISP traffic as an interim measure, as some urge,^{17/} would also be inappropriate. As explained by MCI, a “freeze” on data used for traffic studies, even temporarily, could result in NECA underallocating traffic sensitive costs associated with ISP traffic to the intrastate jurisdiction, and overallocating these costs to the interstate jurisdiction.^{18/} Such an overallocation of costs to the interstate jurisdiction would inflate interstate access charges as well as lead to a fundamental mismatch between the costs and

^{15/} As noted by ALTS, roughly twenty state commissions have already ruled that Internet traffic is not interstate: Arizona, Colorado, Connecticut, Illinois, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin. ALTS Comments at 15-18. In addition, at least two states – Delaware and Georgia – have pending for final action hearing examiner recommendations that Internet traffic is local, and the issue is currently being examined in proceedings in Alaska, California, Florida, Kentucky and Ohio. See id. at 18, fn.7.

^{16/} See, e.g., DPUC Investigation Into the Unbundling of the Southern New England Telephone Company’s Local Telecommunications Network – Reopened, Docket No. 94-10-02, Decision (January 17, 1996) at 72 (Connecticut); Re: MFS Intelenet of Maryland, Inc., Policies Regarding Competitive Local Exchange Telephone Service, Case No. 8584, Order No. 72348 (Phase II), 86 Md. P.S.C. 467, 1995 WL 848272 (December 28, 1995) at *12 (Maryland); Case 94-C-0095, Proceeding on Motion of the Commission to Examine Issues Relating to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market; Order Instituting Framework for Directory Listings, Carrier Interconnection and Inter-carrier Compensation (September 27, 1995) at 12-13 (New York).

^{17/} See, e.g., NECA Petition at 6; Comments of BellSouth Telecommunications, Inc., CC Docket No. 80-286 (filed June 4, 1998) at 2.

^{18/} MCI Comments at 5.

revenues allocated to the jurisdictions.^{19/} Moreover, granting the NECA Petition on an “interim basis” would in effect be changing the status quo to the result incumbent carriers seek without awaiting the outcome of any of the pending proceedings that raise the issue.^{20/} Therefore, unless and until the FCC decides on the basis of a full and fair record to alter this well-reasoned precedent, the Commission should require all carriers to continue the current treatment of ISP traffic as intrastate, including for jurisdictional separations purposes.

Moreover, in addressing the NECA Petition, it is crucial that the FCC note that while a number of commenters argue that the inclusion of ISP traffic in their local traffic studies artificially reduces their weighted Dial Equipment Minutes (“DEM”) and other interstate separations factors,^{21/} these assertions appear to be little more than rough estimates, devoid of necessary factual data or other evidentiary support. Certainly, without genuine data subject to verification by the Commission and interested parties, the Commission cannot simply accept carriers’ claims that the general rule should be altered. In fact, some of these claims appear to assume the result they urge, i.e., that there will be cost distortions because ISP traffic should actually be treated as interstate. Likewise, although some parties point to processes they assert will allow them to measure the jurisdictional nature of ISP traffic, there is no evidence they can actually perform such a task.^{22/} Other than simply assuming all ISP traffic is interstate, it is not

^{19/} Id. at 6.

^{20/} See n. 7, supra, for pending proceedings which raise the issue.

^{21/} See, e.g., Comments of ICORE, Inc., CC Docket No. 80-286 (filed June 4, 1998) at 2; Comments of Mashell Telecom, Inc., CC Docket No. 80-286 (filed June 4, 1998) at 1; Comments of TELECOM Consulting Resources, Inc., CC Docket No. 80-286 (filed June 3, 1998) at 2.

^{22/} See, e.g., Comments of SBC at 4; SBC written ex parte presentation in CC Dockets 80-286, 96-45, 96-262 - CCB/CPD 97-30 (May 8, 1998) at Tab 1, p.7 (“SBC ex parte”).

clear how such an analysis would be performed as a practical matter. Indeed, AOL, as the leading ISP, is unaware of any method to track any individual user's online session.^{23/}

Finally, it is noteworthy that even according to SBC and USTA -- two strong supporters of the argument that ISP traffic should be treated as interstate -- NECA's proposal to exclude ISP traffic from all traffic studies is not appropriate grounds for a waiver, but rather should be addressed in one of pending FCC proceedings concerning the implications of ISP traffic.^{24/} AOL submits that if the Commission believes it should address again the long-standing treatment of ISP traffic, it should do so in the context of its already pending proceedings rather than in the context of a waiver petition.

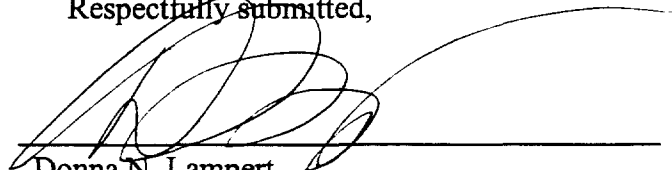
^{23/} Thus, while SBC has made claims that it has found between 92% and 99% of ISP traffic is interstate, it provides no basis whatsoever for this assertion. See SBC ex parte, supra.

^{24/} Comments of SBC Communications, Inc., CC Docket No. 80-286 (filed June 4, 1998) at 6-7; Comments of United States Telephone Association, CC Docket No. 80-286 (filed June 4, 1998) at 2.

CONCLUSION

For the reasons stated above, the Commission should deny NECA's request for waiver of Section 36.2(a)(3) of the Commission's rules and reaffirm that all carriers must continue to include Internet traffic in their traffic studies.

Respectfully submitted,



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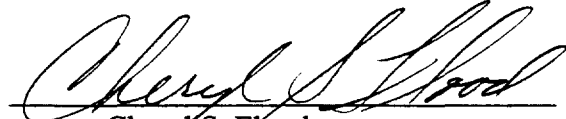
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 1998, I caused a copy of the foregoing
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